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7 IN THE UNITED STATES DISTRICT COURT

8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9
10 LUIS GONZALES,

No. C 04-5474 CW

11 Petitioner,

12 v.

13 THOMAS L. CAREY, Warden,

14 Respondent.

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16 _____/

17

ORDER DENYING
PETITION FOR WRIT
OF HABEAS CORPUS

18 INTRODUCTION

19 Petitioner Luis Gonzales, an individual formerly incarcerated
20 at California State Prison, Solano (CSP, Solano), petitions for a
21 writ of habeas corpus under 28 U.S.C. § 2254 on several grounds.
22 Respondent D.K. Sisto, Warden of CSP, Solano, opposes the
23 petition.¹ The Court DENIES Gonzales' petition for a writ of
24 habeas corpus.

25 BACKGROUND

26 Unless indicated otherwise, the following facts are taken from

27
28 ¹The Court substitutes the current warden, D.K. Sisto, for
Thomas Carey as Respondent.

1 the state appellate court's unpublished opinion ruling on Gonzales'
2 direct appeal. Respondent's Exhibit 7, App. A.

3 Gonzales owned an auto body shop at 1409 104th Avenue in
4 Oakland. On September 1, 1998 at approximately 8:20 PM, Gonzales
5 shot and killed his former neighbor Jose Tenorio on the street near
6 the shop. Gonzales was charged with murder with personal use of a
7 handgun and discharge of a handgun causing great bodily injury.
8 Gonzales claimed that he acted in self-defense.

9 At trial, the prosecution presented the testimony of several
10 eyewitnesses. The California Court of Appeal summarized the
11 prosecution's case as follows:

12 At the time of the killing, Ricardo Munoz was
13 parked in his truck with his then-girlfriend Maria
14 Medina, in front of her house at 1429 104th Ave. He
15 heard two gunshots, one right after the other, and
16 looked to see where they came from. He saw a man on
17 the ground and another man pointing a pistol at the man
18 on the ground. The man with the pistol took one or two
19 steps toward the man on the ground and shot him a third
time, from a distance of six feet, holding the gun at
about a 60-degree angle to the ground. The area was
illuminated by a streetlight, and the gunman was close
enough to Munoz's truck that Munoz was afraid the
gunman would hear him calling 911 on his cell phone.
Munoz did not hear anyone arguing, or see anyone
fighting, before the shooting.

20 Maria Medina also heard the shots. She saw a man,
21 whom she identified as defendant, shooting a man as he
22 was falling to the ground. She heard several shots
"like fast," and then a final shot a moment, or a few
23 seconds, later. She saw defendant fire the last shot;
the victim was already on the ground as defendant
24 fired. Defendant fired down toward Tenorio, holding
the gun at an angle of 60 degrees. Defendant then
walked back inside his shop. The area was lit by at
least one streetlight.

25 Maria testified about a history of conflict
26 between defendant and Tenorio. The two men had a
dispute over Tenorio's keeping roosters, or cocks, on
defendant's vacant lot next to his body shop. Tenorio
kept the cocks in cages on the lot and held cockfights
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1 on weekends.² On May 15, 1998, three and a half months
2 before the killing, Tenorio chased defendant around a
3 car with a long-handled hoe. Tenorio struck the car
4 with the hoe while he was trying to strike defendant.
5 During the incident the two were arguing.

6 Defendant's neighbor, Agustin Galvan, witnessed
7 the shooting. Galvan had been cleaning a vacant
8 apartment and taking out the trash. He saw defendant
9 walk out of his body shop and across the street, "[a]
10 little bit in a hurry." Defendant walked up to Galvan
11 and greeted him and another neighbor, Mario Jones, as
12 they stood near Galvan's pickup truck. Tenorio was
13 also in the group. When defendant saw Tenorio,
14 defendant looked serious, worried, and pale. Defendant
15 told Tenorio, "The threats are going to stop." Tenorio
16 replied, "What do you think."

17 Tenorio then moved away from the truck, holding
18 his hands at about waist level with the palms facing
19 forward. He was five or six feet from defendant, and
20 facing him. He did not move toward defendant.

21 Without saying anything more, defendant pulled a
22 semiautomatic pistol from his belt, held it with two
23 hands, and shot Tenorio two or three times. Tenorio
24 fell back. "Some seconds" later, and after having
25 walked toward Tenorio, "[h]e bent down and shot him
again," in the head, as he lay on the ground. Then
defendant stood up, put away the pistol, and walked
away. But before he left he told Galvan and Jones,
"You are going to be witnesses." Defendant walked back
into his body shop.

Galvan did not see Tenorio with a weapon or with
anything in his hands. He did not see Tenorio reach
into his pants pocket or waistband, or do anything that
looked like he was reaching for a weapon. Tenorio did
not threaten defendant before the shots were fired.

Galvan also testified that there were prior
conflicts between defendant and Tenorio. He confirmed
Maria's account of the cockfighting on the vacant lot,
and also confirmed the incident concerning the hoe. He
also said the two had a "physical fight" in April 1998.
And apparently defendant had something to do with
Tenorio being fired from his job.

• • •
The People presented evidence that defendant
attempted to fabricate evidence by trying to get Maria
Medina to sign a letter repudiating much of her
anticipated trial testimony. The letter . . . is in
the record. . . . In essence, the letter purports to

²⁶Defendant rented the lot from its owner, Arturo Lopez. It is
27 clear from the record that Tenorio used the lot without defendant's
permission or approval.

1 say that Medina was leaning over towards the floor of
2 Munoz' truck and was "distracted" by him, that it was
3 "very dark" and the area was insufficiently lit by
4 streetlights, and that Medina did not really see or
5 hear what happened and shouldn't be a witness. The
6 letter also purports to say that Medina saw only
7 silhouettes of people and could identify no one, and
8 heard only a volley of shots in rapid succession.

9 . . .
10 Defendant objected to admitting the letter on the
11 grounds that it did not contradict Maria's testimony
12 and that it was more prejudicial than probative.
13 (Evid. Code, § 352.) The court overruled the objection
14 and admitted the letter as evidence of defendant's
attempt to fabricate evidence.

15 Gustavo [Medina, Maria's brother], testified in
16 the jury's presence that defendant, while released on
17 bail, gave him the letter and asked him to have Maria
18 copy it. Defendant asked this of Gustavo on several
19 occasions. Gustavo gave Maria the letter. She read
20 part of it and gave it back to Gustavo, who returned it
21 to defendant. Maria never gave Gustavo a copy of the
22 letter in her handwriting. Gustavo never gave
23 defendant anything from Maria.

24 At the conclusion of Gustavo's testimony, a typed
25 English translation of the letter was provided to the
26 jury.

27 Respondent's Exhibit 7, App. A at 2-5 (some alterations and
28 footnote in original).

1 The defense called witnesses who testified that Tenorio was a
2 violent individual who had assaulted or threatened various people
3 in the neighborhood and was reputed to carry a knife, gun or
4 machete. Between April 27, and May 15, 2008, Tenorio had assaulted
5 or verbally abused Gonzales on at least five occasions. Tenorio
6 had threatened to kill Gonzales many times and had also threatened
7 Gonzales' wife and daughter.

8 At the time of the shooting, Gonzales was in the process of
9 working with an attorney to file papers seeking a restraining order
10 against Tenorio. On the day of the shooting, Tenorio had called
11 Gonzales stating that he was sharpening a machete that he intended
12 to use.

1 to use to cut Gonzales into little pieces.

2 The California Court of Appeal summarized Gonzales' testimony
3 about the shooting as follows:

4 Defendant left his shop about 8:15 p.m.. Tenorio,
5 who no longer lived in the neighborhood, had driven up
6 and parked in front of defendant's shop. Defendant put
7 his daughter in his truck, then saw Tenorio, who was
8 sitting his car. Tenorio displayed a machete. Tenorio
9 then took a revolver from the glove compartment of his
10 car and put it in his waistband. He walked to his
11 trunk, slammed it, and then walked toward defendant
12 with the machete. Defendant locked his daughter in the
13 truck and walked into his shop to get his gun.
14 Defendant kept the gun because of four or five
15 robberies or attempted robberies at his shop.

16 Defendant put his gun in his waistband and walked
17 back outside to get his daughter. He saw Tenorio
18 "hiding behind [a] truck." He thought Tenorio was
19 going to kill him. Mario Jones and Agustin Galvan were
20 there. Jones told Tenorio that defendant had a gun.
21 Tenorio said he wasn't afraid of defendant and "I've
22 got mine as well."

23 Defendant greeted Jones and Galvan. Defendant
24 then told Tenorio to "please . . . stop the death
25 threats toward me and my family." Tenorio answered,
26 "What are you thinking?" and then moved suddenly, as if
27 he was going to take his gun from his waistband.
28 Defendant was scared and thought Tenorio was going to
kill him. Defendant pulled out his gun, pointed it at
Tenorio, closed his eyes, and fired five or six shots.
He didn't remember shooting Tenorio once Tenorio was on
the ground. He told Jones and Galvan that "they had
been witnesses," and returned to his shop.

Id. at 8.

29 The trial court instructed the jury on the law of homicide,
30 the defense of self-defense and the lesser included offense of
31 voluntary manslaughter for killing in imperfect self-defense, that
32 is, in the honest but unreasonable belief that one's life is in
33 danger. The trial court also instructed the jury with California
34 Jury Instruction (CALJIC) No. 2.04, which provides that evidence of
35 a defendant's attempt to fabricate evidence may be considered as a
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1 circumstance tending to show consciousness of guilt.

2 After more than three days of deliberations, the jury found
3 Gonzales not guilty of murder but guilty of the lesser included
4 offense of voluntary manslaughter for killing in imperfect self-
5 defense. The jury also found that Gonzales personally used a
6 handgun. After denying Gonzales' motion for a new trial based on
7 juror misconduct, the trial court sentenced him to the middle term
8 of six years for voluntary manslaughter and four years for use of a
9 handgun, for a total of ten years.

10 On October 9, 2003, the California Court of Appeal affirmed
11 the judgment in an unpublished opinion and rejected Gonzales'
12 claims of trial error based on (1) the prosecutor's use of
13 peremptory challenges to remove two Hispanic prospective jurors
14 from the venire in violation of Gonzales' rights under the Sixth
15 and Fourteenth Amendments; (2) the trial court's use of CALJIC No.
16 2.04, instructing the jury that it could consider whether Gonzales
17 attempted to fabricate evidence, in violation of due process; and
18 (3) the trial court's denial of Gonzales' motion for a new trial
19 based on allegations of juror misconduct in violation of his rights
20 under the Sixth and Fourteenth Amendments. On December 17, 2003,
21 the California Supreme Court denied review. Gonzales' petition for
22 certiorari in the United States Supreme Court was denied as
23 untimely. Gonzales did not seek collateral review in the state
24 courts.

25 On December 28, 2004, Gonzales filed his federal petition for
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1 a writ of habeas corpus.³ On July 6, 2005, this Court issued an
2 order to show cause on the three claims addressed by the California
3 Court of Appeal.⁴ On August 16, 2005, Respondent filed a motion to
4 dismiss the petition as not fully exhausted, noting that Gonzales'
5 second claim based on CALJIC No. 2.04 was not presented to the
6 California Supreme Court for review. The Court granted the motion
7 to dismiss and also granted Gonzales' subsequent request to stay
8 the proceedings while he exhausted his jury instruction claim. On
9 December 29, 2006, Gonzales informed the Court that his state
10 proceedings had concluded and filed a first amended habeas
11 petition, including his newly-exhausted jury instruction claim. On
12 January 31, 2007, the Court granted Gonzales' motion to lift the
13 stay and granted him leave to file his first amended petition.

LEGAL STANDARD

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court may grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court only if the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

²⁴ ³Gonzales' "Motion to incorporate record with exhibits" filed in support of his initial petition is GRANTED. (Docket. No. 17).

25 ⁴In his traverse, Gonzales appears to challenge his sentence
26 and to raise various other claims. However, such claims are
27 neither exhausted nor properly presented because they appear for
the first time in Gonzales' traverse. The Court will address only
the three claims addressed by the Court of Appeal.

1 States;⁵ or (2) resulted in a decision that was based on an
2 unreasonable determination of the facts in light of the evidence
3 presented in the State court proceeding." 28 U.S.C. § 2254(d).

4 "Clearly established federal law" refers to "the holdings, as
5 opposed to the dicta, of [the Supreme] Court's decisions as of the
6 time of the relevant state-court decision." Williams (Terry) v.
7 Taylor, 529 U.S. 362, 402-04, 412 (2000). A state court decision
8 may not be overturned on habeas review simply because of a conflict
9 with circuit-based law. Duhaime v. Ducharme, 200 F.3d 597, 600
10 (9th Cir. 2000). However, circuit court decisions may be
11 persuasive authority to determine whether a particular state court
12 holding is an "unreasonable application" of Supreme Court precedent
13 or to assess what law is "clearly established." Id.; see also
14 Clark v. Murphy, 331 F.3d 1062, 1070-71 (9th Cir.), cert. denied,
15 124 S. Ct 446 (2003); Moore v. Calderon, 108 F.3d 261, 264 (9th
16 Cir. 1997).

17 A state court's decision is "contrary to" Supreme Court law if
18 the state court "arrives at a conclusion opposite to that reached
19 by [the Supreme Court] on a question of law," or reaches a
20 different conclusion based on facts indistinguishable from a
21 Supreme Court case. Williams, 529 U.S. at 412-13. A state court's
22 decision constitutes an "unreasonable application" of Supreme Court
23 precedent if the state court "either (1) correctly identifies the
24 governing rule but then applies it to a new set of facts in a way

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26 ⁵ Both prongs of § 2254(d)(1) apply to questions of law and
27 mixed questions of law and fact. Van Tran v. Lindsey, 212 F.3d
1143, 1150 (9th Cir. 2000), overruled on other grounds, Lockyer v.
Andrade, 538 U.S. 63, 70-74 (2003).

1 that is objectively unreasonable, or (2) extends or fails to extend
2 a clearly established legal principle to a new context in a way
3 that is objectively unreasonable." Id. at 407. An "unreasonable
4 application" of federal law is different from an incorrect or
5 erroneous application of federal law. Id. at 412. Accordingly,
6 "a federal habeas court may not issue the writ simply because that
7 court concludes in its independent judgment that the relevant state
8 court decision applied clearly established federal law erroneously
9 or incorrectly. Rather, that application must also be
10 unreasonable." Id. at 411. The reasonableness inquiry under the
11 "unreasonable application" clause is objective. Id. at 409.

12 In determining whether the state court's decision is contrary
13 to, or involved an unreasonable application of, clearly established
14 federal law, a federal court looks to the decision of the highest
15 state court to address the merits of a petitioner's claim in a
16 reasoned decision. LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th
17 Cir. 2000). If the state court considered only state law, the
18 federal court must ask whether state law, as explained by the state
19 court, is "contrary to" clearly established governing federal law.
20 See Lockhart v. Terhune, 250 F.3d 1223, 1230 (9th Cir. 2001). If
21 the state court, relying on state law, correctly identified the
22 governing federal legal rules, the federal court must ask whether
23 the state court applied them unreasonably to the facts. Id. at
24 1232.

25 DISCUSSION

26 I. Motion for a new trial

27 On October 26, 2001, two days after the jury reached its

1 verdict, Juror 4 contacted defense counsel. Juror 4 filed a
2 declaration stating that

3 during jury deliberations and prior to the verdict I
4 spoke to an attorney friend and asked him if he knew
what sentence or punishment Mr. Gonzalez would receive
if he was convicted of voluntary manslaughter. My
5 attorney friend advised me that he believed Mr.
Gonzalez would receive three or possibly six years in
6 state prison and serve fifty percent of his sentence
. . . . [B]ased on this information, I changed my vote
7 from not guilty because of self defense[] to guilty of
voluntary manslaughter. . . . [I]f I had known that
8 Mr. Gonzalez could receive up to twenty one years in
state prison, I would not have changed my vote of Not
9 Guilty.

10 Clerk's Transcript (C.T.) at 1138.

11 Gonzales filed a motion for a new trial based on the
12 information contained in the declaration. At the hearing on the
13 motion, Juror 4 asserted his Fifth Amendment privilege against
14 self-incrimination. The prosecution refused to offer him immunity.
15 Therefore, the only potential factual basis for Gonzales' motion
16 was the declaration. The trial court found that certain portions
17 of the declaration were admissible under the hearsay exception for
18 declarations against interest. In particular, the trial court
19 found admissible the portions of the declaration establishing that
20 (1) Juror 4 had spoken to an attorney and (2) the attorney told
21 Juror 4 that he believed Gonzales would be sentenced to three to
22 six years in prison and serve fifty percent of such a sentence if
23 convicted of voluntary manslaughter.⁶ However, the trial court
24 found that those portions of the declaration describing the impact
25 of the information on Juror 4's conduct were inadmissible under

26
27 ⁶Apparently, the juror's understanding was not entirely
correct.

1 California Evidence Code § 1150, which provides,

2 Upon an inquiry as to the validity of a verdict, any
3 otherwise admissible evidence may be received as to
4 statements made, or conduct, conditions, or events
5 occurring, either within or without the jury room, of
6 such a character as is likely to have influenced the
7 verdict improperly. No evidence is admissible to show
8 the effect of such statement, conduct, condition, or
9 event upon a juror either in influencing him to assent
10 to or dissent from the verdict or concerning the mental
11 processes by which it was determined.

12 Cal. Evid. Code § 1150(a). Those portions of the juror's
13 declaration would also be inadmissible under Federal Rule of
14 Evidence 606(b).

15 The trial court found that Juror 4's communication with his
16 attorney friend constituted juror misconduct and proceeded to
17 determine whether the misconduct was prejudicial. Ruling from the
18 bench, the trial court stated,

19 I am mindful of the fact that information concerning
20 potential penalty and punishment is widely broadcast in
the newspapers, public media, in books, on television,
et cetera; there is speculation, and I frankly do not
find this to be prejudicial. This particular
information is almost actually a matter of public
knowledge what the punishment for a voluntary
manslaughter sentence is. And to the extent that
[Juror 4] may have misinterpreted this information I
cannot speculate as to whether or not his
misinterpretation was so extreme as to be prejudicial
to the defendant.

21 Reporter's Transcript (R.T.) at 1288.

22 The California Court of Appeal agreed that the information
23 Juror 4 learned from his attorney friend was not "inherently
24 prejudicial." Respondent's Ex. 7, Ex. A at 20. Although the Court
25 of Appeal noted that "the sentence for manslaughter may not be as
26 widely known as the trial court suggested," it agreed that "the
27 mere knowledge of that penalty cannot be said, in and of itself, to

1 mandate a finding of prejudice." Id.

2 The Sixth Amendment guarantees to the criminally accused a
3 fair trial by a panel of impartial jurors. U.S. Const. amend. VI;
4 see Irvin v. Dowd, 366 U.S. 717, 722 (1961). This guarantee
5 requires that the jury verdict be based on the evidence presented
6 at trial. See Turner v. Louisiana, 379 U.S. 466, 472-73 (1965);
7 Jeffries v. Wood, 114 F.3d 1484, 1490 (9th Cir.) (en banc), cert.
8 denied, 522 U.S. 1008 (1997). Jury exposure to extrinsic material
9 deprives a defendant of the rights to confrontation,
10 cross-examination and assistance of counsel embodied in the Sixth
11 Amendment. See Lawson v. Borg, 60 F.3d 608, 612 (9th Cir. 1995).
12 But a petitioner is entitled to habeas relief only if it can be
13 established that the exposure to extrinsic material had
14 "'substantial and injurious effect or influence in determining the
15 jury's verdict.'" Sassounian v. Roe, 230 F.3d 1097, 1108 (9th Cir.
16 2000) (quoting Brecht, 507 U.S. at 623).

17 Gonzales first argues that the California courts' exclusion of
18 the portions of Juror 4's declaration discussing the impact of the
19 extraneous information was improper. Gonzales asserts that, while
20 such statements are generally inadmissible under Federal Rule of
21 Evidence 606(b), the information should have been admitted as a
22 statement against interest. However, Gonzales cites no authority
23 for using a hearsay exception to allow evidence barred by Rule
24 606(b).

25 Gonzales next argues that the finding that the juror
26 misconduct was not prejudicial was an unreasonable application of
27 Supreme Court law. The Court of Appeal held that the finding of a
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1 lack of prejudice was particularly proper "given the state of the
2 evidence," which it described as follows:

3 This case is not as close as defendant contends.
4 Several eyewitnesses saw defendant fire several shots
5 at Tenorio who was unarmed, and then stand over him
6 and deliver a coup de grace. We see no abuse of
7 discretion in the trial court's determination that the
8 juror misconduct did not prejudice defendant. As
9 outlined in Carpenter, we look at the entire record
10 including the nature of the juror's conduct, the
11 circumstances under which the information was
12 obtained, the instructions the jury received, the
13 nature of the evidence and issues at trial, and the
14 strength of the evidence against the defendant. The
15 presumption of prejudice here is rebutted because
16 there is extremely strong proof in support of the
17 verdict and the jurors were properly instructed on how
18 to carry out their duties.

19 Id. (footnote and internal citation omitted).

20 The jury was correctly instructed that it was not to consider
21 the sentence in its decision as to guilt. Based on the only
22 evidence that was admissible -- that Juror 4 committed misconduct
23 and received partially incorrect information about the possible
24 sentence -- the state courts did not unreasonably find that
25 Petitioner was not prejudiced. While Juror 4 proffered testimony
26 about the impact his discussion with his attorney friend had on his
27 verdict, it is not clear whether Juror 4 thought Petitioner was
28 guilty of voluntary manslaughter but was reluctant to say so until
he was assured that the sentence would not be longer than he
thought fair, or whether he thought Petitioner was innocent but was
willing to find him guilty anyway as long as the sentence would not
be too onerous. This is the type of evidence that is inadmissible
as a policy matter in both state and federal court.

II. Batson Claim

2 The use of peremptory challenges by the prosecution to exclude
3 cognizable groups from a petit jury may violate the Equal
4 Protection Clause. Georgia v. McCollum, 505 U.S. 42, 55-56 (1992).
5 The Supreme Court has held that the Equal Protection Clause forbids
6 challenging potential jurors solely on account of their race.
7 Batson v. Kentucky, 476 U.S. 79, 89 (1986). Under Batson, a
8 challenge to a peremptory strike is evaluated in three steps.
9 First, the defendant must make a prima facie showing that the
10 prosecutor exercised the peremptory challenge because of race.
11 Id. at 96-97. Second, if the defendant makes such a showing, the
12 burden shifts to the prosecutor to come forward with a race-neutral
13 explanation for the challenge. Id. at 97. Third, the court must
14 determine whether "the defendant has established purposeful
15 discrimination." Id. at 98.

16 Gonzales argues that the trial court violated his right to
17 equal protection when it denied his motion for a mistrial after the
18 prosecution struck Luis G. and Concepcion J., the only two Hispanic
19 venire persons who had been seated in the jury box up to that
20 point.

A. Facts

1. Luis G.

23 Luis G. studied sociology in his home country of Peru and
24 history in France before coming to the United States. At the time
25 of Gonzales' trial, Mr. G. had been in the United States for twelve
26 years. His wife still lived in Peru. He had been unemployed for
27 approximately four months after failing to pass probation for a job

1 with the postal service. Mr. G. repeatedly stated that he would be
2 "uncomfortable" if asked to sit on the jury. When the prosecutor
3 asked him about how he felt about the possibility of being a juror
4 in a murder case, Mr. G. replied, "I don't like it at all." R.T.
5 1429. Mr. G. also stated, "I feel like I don't want to be in a
6 murder case. I don't want to be sitting here as a juror. I don't
7 feel that is my position. So judging other people is something
8 that would be really difficult for me." R.T. 1430.

9 The prosecutor used a peremptory challenge to remove Mr. G.
10 from the jury as soon as he was seated.

11 2. Concepcion J.

12 Concepcion J. was a Mexican-American woman who had taught
13 sociology at California State University in Hayward. At the time
14 of Gonzales' trial, Ms. J. was working as a policy analyst for the
15 University of California Office of the President. When the
16 prosecutor asked her for her thoughts on being a juror in a murder
17 case, Ms. J. responded, "I have mixed feelings. I don't relish the
18 idea of sitting in judgment of someone else." R.T. 1444. In
19 addition, Ms. J. disclosed that she had a relative "whose spouse
20 stalked and harassed her." R.T. 1445.

21 The prosecutor used a peremptory challenge to remove Ms. J.
22 from the jury as soon as she was seated.

23 3. Defendant's Motion

24 After the prosecution removed Ms. J. from the jury, the
25 defense objected and moved for a mistrial pursuant to People v.
26 Wheeler, 22 Cal. 3d 258 (1978), the California equivalent of
27 Batson. The trial court found that the defense had established a

1 prima facie case of a constitutional violation because two of the
2 four peremptory challenges exercised by the prosecution struck "the
3 only two Latinos who to that time ha[d] been called." R.T. 1460.
4 Therefore, the trial court asked the prosecutor "to explain the
5 reasons for his challenges of both these jurors." Id.

6 The prosecutor first stated, "I had both jurors based solely
7 on their questionnaires as no before I even spoke to them." Id.
8 He went on to explain his decision to strike Ms. J. as follows:

9 [F]or lack of a better explanation she reminded me of
10 my wife. When I first got this case I told my wife
11 what the facts were and she said I would vote not
12 guilty in this case. She says I wouldn't have women as
13 jurors in this case because of the fact situation that
14 you told me. Compounded by the fact that [] she []
15 recently found out she is pregnant. Her field is
16 sociology which to me would tell liberal tendencies.

17 Also more importantly, there's going to be a
18 defense allegation that the victim deserved to get what
19 he got because of the victim stalking and harassing the
Defendant in this case. Also, very, very important was
her questions and answers concerning the family member
who was victimized by a stalking and she said that he
should have gotten it sooner and he should have been
incarcerated sooner because he would have prevented
future problems. . . . There are just too many things
leaking into her ability to be the kind of juror that I
am looking for in this case. Like I said, I wouldn't
want my wife given her background to be a juror in the
case that I am presenting.

20 Id. at 1460-61.

21 With respect to Mr. G., the prosecutor explained,

22 The reason for him is he can't hold a job. If someone
23 can't make post office probation - he said he couldn't
24 get through the probation thing for the post office.
He was only there two months and they let him go. You
look at his other jobs, it strikes me for someone with
his education that it just smacks of a problem juror.
Also his wife has psychology background as well.

25 What I have here is someone that can't hold a job
26 and is highly educated. He was educated in sociology
like the other juror and then [] history in Europe.
27 If you can't get hired by the post office, I don't

1 want him on my jury.

2 Id. at 1461-62. The trial court stated, "If I recall, maybe a
3 couple years ago you told me a juror - if he was hired by the post
4 office you didn't want him on your jury." Id. at 1462. The court
5 then asked the prosecutor, "Anything else with regard to Mr. G[.]?"
6 Id. The prosecutor responded, "No. The questionnaire and the voir
7 dire speak for themselves." Id. Although the trial court
8 described the prosecutor's explanation as "somewhat thin," it
9 denied the motion for a mistrial. Id.

10 B. Discussion

11 Although, under Batson, the prosecutor may not "rebut the
12 defendant's prima facie case merely by denying that he had a
13 discriminatory motive," 476 U.S. at 98, the second step of the
14 Batson inquiry "does not demand an explanation that is persuasive,
15 or even plausible." Purkett v. Eлем, 514 U.S. 765, 768 (1995) (per
16 curiam). "Unless a discriminatory intent is inherent in the
17 prosecutor's explanation, the reason offered will be deemed race
18 neutral." Hernandez, 500 U.S. at 360.

19 "In the typical peremptory challenge inquiry, the decisive
20 question will be whether counsel's race-neutral explanation for a
21 peremptory challenge should be believed." Hernandez, 500 U.S. at
22 365. Therefore, findings of discriminatory intent "largely will
23 turn on evaluation of credibility," Batson, 476 U.S. at 98, n.21,
24 and are "subject to review under a deferential standard."
25 Hernandez, 500 U.S. at 264. In order to grant relief under AEDPA,
26 a federal habeas court must find the state court decision that a
27 race-neutral reason was credible to be "an unreasonable

1 determination of the facts in light of the evidence presented in
 2 the State court proceeding." Rice v. Collins, 546 U.S. 333, 338
 3 (2006) (quoting 28 U.S.C. § 2254(d)(2)). Nonetheless, the "court
 4 must evaluate the record and consider each explanation within the
 5 context of the trial as a whole because '[a]n invidious
 6 discriminatory purpose may often be inferred from the totality of
 7 the relevant facts.'" Kesser v. Cambra, 465 F.3d 351, 359 (9th
 8 Cir. 2006) (en banc) (quoting Hernandez, 500 U.S. at 363)
 9 (alterations in original).

10 As the State acknowledges, the Supreme Court has not
 11 established whether a trial court's determination that a
 12 prosecutor's reasons for striking a juror were genuine should be
 13 reviewed under 28 U.S.C. § 2254(d)(2) or the more deferential
 14 standard set out in 28 U.S.C. § 2254(e)(1). However, this Court
 15 need not address the question, because it finds that Gonzales is
 16 not entitled to relief under the more lenient standard set out in
 17 28 U.S.C. § 2254(d)(2).⁷

18 The California Court of Appeal held that "there is nothing to
 19 undermine the trial court's implicit determination that the
 20 proffered race-neutral reasons were sincere and genuine."
 21 Respondent's Ex. 7, Appx. A at 14. Therefore the California court
 22 held, "In light of the record and the defer[ential] standard of
 23 review, we see no improper use of peremptory challenges." Id. at
 24 15. The Court of Appeal held, "With respect to Luis G., the

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 26 ⁷The Court notes that in Kesser v. Cambra, 465 F.3d 351, 358
 27 n.1 (9th Cir. 2006) (en banc), the Ninth Circuit suggested that
 § 2254(d)(2) applies in situations, such as this one, where the
 challenge is "based entirely on the state record."

1 prosecutor had a legitimate concern over a highly educated man who
2 seemed to have trouble holding even a clerical position--indeed,
3 even completing probation. The prosecutor was also concerned that
4 Luis G. was educated in sociology which . . . could indicate a more
5 liberal point of view." Id. at 14. With respect to Ms. J., the
6 California court held that

7 the prosecutor had a legitimate concern her sociology
8 training would make her inclined to be more liberal.
9 He also had input from his own spouse how a female
10 juror would react to a fact pattern involving
11 harassment of a family with a young daughter. This
12 factor is perhaps enhanced by [Ms.] J.'s pregnancy.
13 And [Ms.] J. had a strong feeling that a stalker and
14 harasser in her relative's case should have been
jailed sooner, a feeling which clearly would cause a
prosecutor to suspect sympathy for defendant - whose
15 defense was no doubt going to be that he killed to
protect himself and his daughter.

16 Id. at 15.

17 Gonzales argues that the prosecutor's reasons for removing Mr.
18 G. and Ms. J. from the jury were pretextual. First, Gonzales
19 questions the prosecutor's explanation that he did not want Mr. G.
20 on the jury because, despite being highly educated, Mr. G. was not
21 hired for a clerical position at the post office following the
22 probationary period. Gonzales argues that the trial court's
23 comment that the prosecutor had, in another trial, stated that he
24 did not want somebody hired by the post office on his jury belies
25 the sincerity of the explanation with respect to Mr. G. However,
26 the prosecutor did not explain his challenge based on Mr. G.'s
27 inability to obtain work at the post office in particular. Rather,
28 the prosecutor was concerned that Mr. G. was unable to pass the
probationary period for a clerical job despite his level of

1 education.

2 Gonzales next argues that the prosecutor's race-neutral
3 reasons for striking Ms. J. from the jury were pretextual. He
4 argues that the record does not support the prosecutor's stated
5 belief that Ms. J. might be biased against law enforcement. The
6 prosecutor cited Ms. J.'s belief that law enforcement could have
7 apprehended the individual who was stalking one of her relatives as
8 well as Ms. J.'s training in sociology as indicators that she might
9 be biased against law enforcement. The state court reasonably
10 found that these factors provide a sufficient basis for the
11 prosecutor's belief. Gonzales also argues that the prosecutor's
12 statement that his wife told him that he should not allow women on
13 the jury is evidence of impermissible gender discrimination.
14 However, there is no evidence that the prosecution actually struck
15 all of the women from the jury. Moreover, the prosecutor explained
16 that he struck Ms. J. because she reminded him of his wife, not
17 because she was a woman.

18 The Court finds that it was not unreasonable for the trial
19 court to credit the prosecutor's race-neutral reasons for striking
20 Mr. G. and Ms. J. from the jury.

21 III. Evidence and Instruction Regarding Fabrication of Evidence

22 At trial, Gonzales objected to the introduction of the letter
23 and Gustavo's testimony that Gonzales had asked him to give it to
24 his sister because such evidence was "highly prejudicial." R.T. at
25 451. In addition, he argued that the information in the letter was
26 not inconsistent with Maria's testimony. The trial court overruled
27 the objection, stating that the document would have Maria say "that

1 she did not see what was going on and therefore she felt she could
2 not be a valid witness." Id. In contrast, the court noted, "At
3 her testimony two days ago she testified that she did in fact see
4 what was happening." Id. Therefore, the court permitted the
5 prosecution to call Gustavo to testify about the letter and to put
6 into evidence an English translation of the letter. The court
7 later instructed the jury as follows: "If you find that a defendant
8 attempted to or did persuade a witness to testify falsely or
9 attempted to or did fabricate evidence to be produced at trial,
10 that conduct may be considered by you as a circumstance tending to
11 show a consciousness of guilt. However, that conduct is not
12 sufficient by itself to prove guilt, and its weight and
13 significance, if any are for you to decide." R.T. 1106; see CALJIC
14 No. 2.04. Counsel did not object to the instruction.⁸

15 On direct appeal, the California Court of Appeal held that
16 Gonzales had abandoned his argument that introduction of the letter
17 was more prejudicial than probative, in violation of California
18 Evidence Code § 354. In addition, the Court of Appeal noted that,
19 although Gonzales initially argued that the description of the
20 events contained in the letter was consistent with Maria's
21 testimony, he later conceded that the two versions were not
22 consistent. Nonetheless, the Court of Appeal held that the "letter
23 clearly contradicts the fundamentals of Maria's trial testimony."
24 Respondent's Exhibit 7, App. A at 16. Moreover, the Court of

25
26 ⁸The Court of Appeal noted that there had been no objection,
27 but exercised its discretion pursuant to California Penal Code
§ 1259 to consider the claim. Respondent's Exhibit 7, App. A at 15
n.6.

1 Appeal held that "the inference may fairly be made from the
2 testimony of Gustavo, and the existence of the letter, that
3 defendant drafted an exculpatory document which would have refuted
4 the core of Maria's expected damaging trial testimony, and wanted
5 to make it look like she had written it in her own hand." Id. The
6 Court of Appeal discounted Gonzales' argument that he had given
7 "the letter to Gustavo simply to have Maria determine if it set
8 forth a correct version of her story." Id. at 16 n.7. Therefore,
9 the Court of Appeal rejected Gonzales' argument that there was no
10 evidentiary basis for CALJIC No. 2.04. The Court of Appeal further
11 stated that, even if it was improper to instruct the jury with
12 CALJIC No. 2.04, there was sufficient alternative evidence to
13 support the conviction and any error was therefore harmless.

14 Gonzales again argues that the introduction of the letter and
15 Gustavo's testimony was prejudicial and the subsequent instruction
16 regarding the fabrication of evidence was a violation of his right
17 to due process. However, Gonzales' argument is based on his
18 position that the "trial judge erred in reaching a conclusion that
19 the defendant in this case attempted to fabricate evidence and then
20 in it's [sic] decision that followed, allowed the jury to consider
21 it as consciousness of guilt." Amended Petition at 93. The court
22 did not make such a conclusion. Rather, the court instructed
23 jurors that if they found that Gonzales had attempted to fabricate
24 evidence, they could consider whether such actions were evidence of
25 a consciousness of guilt. As Gonzales points out, he presented his
26 explanation that he drafted the letter only to seek confirmation
27 from Maria of what Gustavo told Gonzales Maria had seen. The jury

1 was able to consider and weigh the credibility of Gonzales'
2 explanation for his actions in reaching its verdict.

3 Gonzales would be entitled to federal habeas relief based on
4 the admission of the testimony and evidence only if its admission
5 "so fatally infected the proceedings as to render them
6 fundamentally unfair." Gonzalez v. Knowles, 515 F.3d 1006, 1011
7 (9th Cir. 2008) (quoting Jammal v. Van de Kamp, 926 F.2d 9818, 920
8 (9th Cir. 1991)). "Only if there are no permissible inferences the
9 jury may draw from the evidence can its admission violate due
10 process." Jammal, 926 F.2d at 920. Here, a permissible inference
11 from the evidence was that Gonzales attempted to fabricate evidence
12 to challenge Maria's testimony.

13 The state court was not unreasonable in finding that neither
14 the admission of evidence of the letter Gonzales gave to Gustavo
15 nor the jury instruction related to that evidence violated
16 Gonzales' right to due process.

17 CONCLUSION

18 For the reasons set forth above, Gonzales' amended petition
19 for writ of habeas corpus is DENIED (Docket No. 16). The Clerk
20 shall enter judgment against Petitioner and close the file. The
21 parties shall bear their own costs.

22 IT IS SO ORDERED.



24 Dated: 10/30/08

CLAUDIA WILKEN
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

GONZALES,

Plaintiff,

Case Number: CV04-05474 CW

V.

CAREY et al,

Defendant.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on October 30, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
in the Clerk's office.

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22 Dated: October 30, 2008

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk